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STATE OF WISCONSIN
BEFORE THE REAL ESTATE BOARD

IN THE MATTER OF DISCIPLINARY PROCEEDINGS AGAINST ARTHUR F. LUETKE, a/k/a FAIRCREST MANAGEMENT a/k/a LUETKE INVESTMENT REAL ESTATE RESPONDENT.	: : : : : : :	FINAL DECISION AND ORDER LS9104081REB

The State of Wisconsin, Real Estate Board, having considered the above-captioned matter and having reviewed the record and the Proposed Decision of the Administrative Law Judge, makes the following:

ORDER

NOW, THEREFORE, it is hereby ordered that the Proposed Decision annexed hereto, filed by the Administrative Law Judge, shall be and hereby is made and ordered the Final Decision of the State of Wisconsin, Real Estate Board.

The Division of Enforcement and Administrative Law Judge are hereby directed to file their affidavits of costs, and mail a copy thereof to respondent or his or her representative, within 15 days of this decision.

Respondent or his or her representative shall mail any objections to the affidavit of costs filed pursuant to the foregoing paragraph within 30 days of this decision, and mail a copy thereof to the Division of Enforcement and Administrative Law Judge.

The rights of a party aggrieved by this Decision to petition the board for rehearing and the petition for judicial review are set forth on the attached "Notice of Appeal Information."

Dated this 22ND day of APRIL, 1993.

Peter J Schils

STATE OF WISCONSIN
BEFORE THE REAL ESTATE BOARD

IN THE MATTER OF
DISCIPLINARY PROCEEDINGS AGAINST

ARTHUR F. LUETKE,
a/k/a FAIRCREST MANAGEMENT
a/k/a LUETKE INVESTMENT REAL ESTATE

LS9104081REB

Respondent

PROPOSED DECISION

The parties to this proceeding for the purposes of Wis. Stats. sec. 227.53 are:

Arthur F. Luetke
4610 University Avenue, Suite 104
Madison, WI 53705

State of Wisconsin
Real Estate Board
1400 East Washington Avenue
P.O. Box 8935
Madison WI 53709

Department of Regulation & Licensing
Division of Enforcement
1400 East Washington Avenue
P.O. Box 8935
Madison, WI 53708

A hearing was conducted in this matter on January 27, 1993, at 1400 East Washington Avenue, Madison, Wisconsin. Arthur F. Luetke, respondent herein, appeared in person and by Attorney Donald B. Bruns. Complainant appeared by Attorney Henry E. Sanders.

Based upon the entire record in this matter, the administrative law judge recommends that the Real Estate Board adopt as its final decision in the matter the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Arthur F. Luetke, 4610 University Avenue, Suite 104, Madison, Wisconsin 53705 (respondent) is currently licensed to practice as a real estate broker by license #25925, issued on December 29, 1975. Respondent does business as Luetke Investment Real Estate, as Faircrest Management, and as Rental Energy Inspections.

2. On December 8, 1986, the Department of Industry, Labor and Human Relations (DILHR) issued its *Amended Appeal Tribunal Decision in the Matter of the Rental Unit Energy Efficiency Inspection Certification of Arthur F. Luetke.* The decision found that there were a number of deficiencies under the rental unit energy efficiency code in several buildings that respondent had inspected and certified as in compliance; and that respondent's "failure to adequately inspect these rental units was negligent at best, and in a number of areas, was a wilful disregard of his duties amounting to misconduct within the meaning of the code." Accordingly, respondent was found to have engaged in conduct demonstrating negligence and misconduct in the discharge of his duties as a rental energy inspector, and constituting a conflict of interest, in violation of Wis. Adm. Code sections ILHR 68.12(4), (5) and (7). DILHR ordered that respondent's rental unit energy efficiency certification be revoked.

3. Respondent filed his *Petition for Review* of the DILHR decision in Dane County Circuit Court, Branch 13, Judge Michael Nowakowski presiding. On June 9, 1987, Judge Nowakowski filed the Court's *Settlement Agreement and Order* in the matter, by which the Court accepted the parties' settlement agreement and dismissed the appeal. Based on that agreement, the court found that respondent's conduct did not constitute a conflict of interest, and ordered that respondent could become recertified as a rental unit energy efficiency inspector upon completion of an educational endeavor relating to Wisconsin rental weatherization standards, and upon passing the test required for obtaining a rental unit efficiency inspector certificate. Pursuant to the agreement, the court also ordered that in the event the Department of Regulation and Licensing were to bring proceedings against respondent based on the DILHR action, respondent would have the right, at his sole option, to reopen the Court action.

4. Respondent completed the requirements for recertification in April, 1987, and was recertified as a rental unit efficiency inspector in July, 1987.

5. On or about April 8, 1991, the Department of Regulation & Licensing, Division of Enforcement, filed its *Complaint* and *Notice of Hearing* in this matter. Respondent's petition to reopen the circuit court action pursuant to the June 9, 1987, *Settlement Agreement and Order* was granted by the Court on June 26, 1991.

6. Judge Nowakowski filed the Court's Memorandum Decision and Order in the appeal on June 10, 1992. The decision reversed the DILHR decision finding that respondent was guilty of negligence. The court found that counsel for DILHR at the administrative hearing had withdrawn the charge of negligence, and that it was therefore improper to have found him guilty of that charge. The Court also reversed the DIHLR finding that respondent was guilty of a conflict of interest, based on the Court's June 9, 1987, *Settlement Agreement and Order*. The Court affirmed the DIHLR finding that respondent had engaged in misconduct, and remanded the matter to DILHR for reconsideration of the sanction.

7. The circumstances of the DILHR finding that respondent has engaged in misconduct in his duties as a certified rental unit energy inspector are substantially related to the circumstances of the practices of a real estate broker.

CONCLUSIONS OF LAW

1. The Real Estate Board has jurisdiction in this matter pursuant to Wis. Stats. 452.14.

2. The circumstances of the DILHR finding that respondent has engaged in misconduct in his duties as a certified rental unit energy inspector are substantially related to the practices of a real estate broker.

3. In having been found by DILHR to have engaged in misconduct in his duties as a certified rental unit energy inspector, respondent has violated a law the circumstances of which substantially relate to the practices of a real estate broker, within the meaning and in violation of Wis. Adm. Code sec. RL 24.17(1) and, pursuant to Wis. Adm. Code sec. RL 24.01(3), respondent has thereby demonstrated incompetency to act as a broker in a manner which safeguards the interests of the public, in violation of Wis. Stats. sec. 452.14(2)(i).

ORDER

NOW, THEREFORE, IT IS ORDERED that Arthur F. Luetke be, and hereby is, reprimanded.

IT IS FURTHER ORDERED that, pursuant to Wis. Stats. sec. 440.22(2), Arthur F. Luetke shall pay the assessable costs of this proceeding.

OPINION

The Findings of Fact set forth above are not in dispute with one exception. Respondent argues that the circumstances of the DILHR finding that he engaged in misconduct in his duties as a certified rental unit energy efficiency inspector (energy inspector) are not substantially related to his duties as a real estate broker. He also argues that even if the two are related, the circumstances of the finding of misconduct by DILHR do not demonstrate "incompetency" within the meaning of Wis. Stats. sec. 452.14. Both arguments must be rejected.

The duties of a certified rental unit energy inspector include "to issue certificates that the rental unit complies with the rental unit energy efficiency standards adopted by [DILHR]. . .". "Certification" is defined as ". . . an inspection performed by a certified rental unit energy efficiency inspector to determine if the rental unit complies with the standards specified in the rental unit energy efficiency chapter promulgated by [DILHR] . . .".

Compare the duties of an energy inspector with those duties of a real estate broker found at Wis. Adm. Code ss. RL 24.07(1)&(2).

> **RL 24.07 Disclosure.** (1) DISCLOSURE OF MATERIAL FACTS. . . . Licensees have an affirmative obligation to discover material factors that a reasonably competent and diligent investigation would disclose and to disclose any adverse factors to the buyer or the seller or other interested parties. . . .
>
> (2) INSPECTION OF A PROPERTY. (a) *Listing broker.* When listing a property, a licensee shall conduct a reasonably competent and diligent inspection of the property, which shall include a visual inspection to detect observable conditions of the structure, and inquiries of the seller on the condition of the structure, mechanical systems and other relevant aspects of the property.

The duties of an energy inspector thus parallel those of a broker in requiring each of them to inspect real estate to determine the condition of the structure and to detect problems therewith, and to disclose the results of that inspection to affected parties. Failure to fulfill these obligations constitutes grounds for discipline of energy inspectors under sec. ILHR 68.12(4), Code, and for discipline of brokers under sec. RL 24.01, Code. An energy inspector who is unable or unwilling to carry out his or her responsibilities under the inspection and reporting requirements for rental unit energy efficiency inspections may be similarly unable or unwilling to carry out his or her responsibilities to inspect and report under the requirements of the real estate code. Accordingly, there can be no question that the circumstances of the practices of a

certified rental unit energy efficiency inspector are substantially related to the circumstances of the practices of a real estate broker, within the meaning of Wis. Adm. Code sec. RL 24.17(1) and Wis. Stats. sec. 111.335(1)(c).

But respondent argues that even if the circumstances of the two activities are substantially related, the conclusion does not follow that a finding of misconduct in carrying out one's duties as an energy inspector may lead to a finding of incompetence to act as a real estate broker. That argument is based upon two premises. The first of these is that the conduct found by DILHR in its disciplinary action is not conduct which falls within the accepted definition of incompetence as established by standard reference resources. This aspect of respondent's argument would appear not to find substantial support in the two exhibits of which the ALJ was asked to take official notice. Black's Legal Dictionary defines "incompetency" in part as "Lack of . . . fitness to discharge the required duty." Webster's New Collegiate Dictionary defines "incompetent" in part as "lacking the qualities needed for effective action, " and "inadequate or unsuitable for a particular purpose." Compare those definitions with the definition of "misconduct" at ILHR 68.05(7), which includes "an act performed in the discharge of duties which jeopardizes the interests of the public, including . . . conduct which evidences a lack of trustworthiness."

Which is not to say that there is not a commonly understood distinction between "incompetence" and "misconduct," with the former suggesting inability to perform adequately, and the latter suggesting intentional wrongdoing. What controls this situation, however, is neither dictionary nor commonly understood definitions. Wis. Adm. Code sections RL 24.01(3) and RL 24.17(1) specifically define a violation of any law substantially related to the practice of a real estate broker as constituting "incompetency to act as a broker . . . in such manner as to safeguard the interests of the public," and the Wisconsin Supreme Court has sustained findings of incompetency based upon failure to meet requirements of the real estate code where the nature of violations had little or no connection with the underlying knowledge or ability of the respective respondents. In *Sailer V. Wisconsin R. E. Brokers' Board*, 5 Wis. 2d 344 (1958) the Court upheld the determination of the real estate board that a broker's failure to reduce an offer to purchase to writing, to have the potential purchaser sign the offer, and to leave the offer with the purchaser constituted "incompetency" within the meaning of what is now sec. 452.14(2)(i), Stats. The Court did not find it necessary to establish any nexus between that conduct and an inability by the respondent to fulfill the board's practice requirements. In *Lewis V. Wisconsin R.E. Brokers' Board*, 6 Wis. 2d 99 (1958), the court decided that the interpretation of "incompetency" in *Sailer, supra,* applied, and affirmed a finding that one who failed to timely refund an earnest money deposit after the transaction fell through had violated the incompetency provision. The court reasoned as follows:

> The plaintiffs assert that their competency to act as real estate brokers or salesmen was established to the satisfaction of the board in the first instance under sec. 136.02, Stats. [now 452.03, Stats.], when the board licensed them. Such statute provides, "...Licenses shall be granted only to persons who are trustworthy and competent to transact such businesses in such manner as to safeguard the interests of the public, and only after satisfactory proof thereof has been presented to the board. . .". From this premise, the plaintiffs contend that such competency must be deemed to continue until impaired by future physical or mental injuries or illnesses, and that the word "*incompetency*" in sec. 136.08(2)(i) [now, 452.14(3)(i)], should be interpreted to only embrace such impairment of mental or physical capabilities of a licensee as occurs subsequent to the issuance of the license by the board.
>
> In the recent case of *Sailer v. Wisconsin R. E. Brokers' Board* (1958), [cite omitted], we upheld a determination by the board that a failure of a real estate broker to reduce a prospective purchaser's offer to writing and to have the same subscribed by such prospective purchaser, and to leave a copy with him, constituted "incompetency" on the part of the broker within the meaning of sec. 136.08(2)(i), Stats. The opinion stressed the fact that the board had adopted a rule, 5 Wis. Adm. Code, sec. REB, 5.02(2), which requires that a copy of any offer to purchase must be left by the broker or salesman with the person submitting the offer. We deem that such interpretation of "incompetency" in the *Sailer* case controls the instant appeal.

So here, the board has adopted a rule which would define as incompetency a violation by a licensee of a law the circumstances of which substantially relate to the practices of a real estate broker. Under *Sailer, supra,* such a definition of "incompetency" must be deemed controlling.

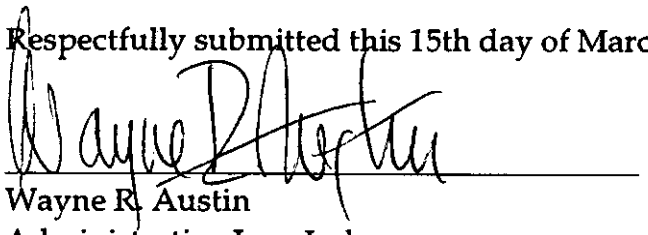
It is well established that the purposes of discipline are to protect the public, to deter other licensees from engaging in similar misconduct, and to promote the rehabilitation of the licensee. *State v. Aldrich,* 71 Wis. 2d 206 (1976). Punishment of the licensee is not an appropriate consideration. *State v. McIntyre,* 41 Wis. 2d 481 (1961).

Mr. Luetke has, of course, already been subject to disciplinary action by another state agency for the specific conduct which provides the basis for discipline by the Real Estate Board. Respondent argues that for the Real Estate Board to take further disciplinary action for the same conduct dealt with by DILHR constitutes double jeopardy. Respondent thus attempts to invoke a Constitutional guarantee applicable

only in criminal proceedings. See *State v. Killebrew,* 115 Wis. 2d 243, where the court cites the U.S. Supreme Court as affirming that "double jeopardy applies only to proceedings that are 'essentially criminal'." But even if the principle if not the letter of the double jeopardy doctrine were applicable to this proceeding, respondent's attempt to invoke the principle would be unavailing. While the events underlying both proceedings are the same, there are two separate licensing jurisdictions involved. This situation may therefore be compared to another concept borrowed from the double jeopardy doctrine: That of dual sovereignty, whereby two states may both prosecute an individual for the same act where the laws of each jurisdiction have been violated. See *Heath v. Alabama,* 474 US 82 (1985). This case is indistinguishable in a legal sense from the not unusual situation where an individual is licensed as both a broker and an attorney. It may not be seriously contended that where such a dual licensee engages in conduct which violates the rules of conduct of both licensing authorities, one of the two authorities would be foreclosed from bringing disciplinary action if the other has preceded it.

Nonetheless, the fact that respondent has been previously disciplined for this conduct is not irrelevant. In terms of the disciplinary objectives, the discipline imposed by the sister agency seems well calculated to result in public protection, deterrence and rehabilitation of the licensee. And even as a substantial relationship exists between the conduct for which respondent was disciplined by DILHR and the practice of a real estate broker, so it may be expected that accomplishment of the disciplinary objectives in the previous proceeding could be expected to have substantially the same salutary effect as to this one. Accordingly, while it would be inappropriate to impose no discipline for this violation of the real estate laws, a reprimand is probably sufficient to foster an understanding in this and other brokers that a failure to exercise scrupulous honesty in all of a broker's professional transactions with the public is without question a failure to meet his or her responsibility as a broker -- whether or not a particular transaction may be specifically defined as the practice of real estate.

Respectfully submitted this 15th day of March, 1993.



Wayne R. Austin
Administrative Law Judge

WRA:BDLS2:2831

NOTICE OF APPEAL INFORMATION

(Notice of Rights for Rehearing or Judicial Review, the times allowed for each, and the identification of the party to be named as respondent)

The following notice is served on you as part of the final decision:

1. Rehearing.

Any person aggrieved by this order may petition for a rehearing within 20 days of the service of this decision, as provided in section 227.49 of the Wisconsin Statutes, a copy of which is attached. The 20 day period commences the day after personal service or mailing of this decision. (The date of mailing of this decision is shown below.) The petition for rehearing should be filed with the State of Wisconsin Real Estate Board.

A petition for rehearing is not a prerequisite for appeal directly to circuit court through a petition for judicial review.

2. Judicial Review.

Any person aggrieved by this decision has a right to petition for judicial review of this decision as provided in section 227.53 of the Wisconsin Statutes, a copy of which is attached. The petition should be filed in circuit court and served upon the State of Wisconsin Real Estate Board

within 30 days of service of this decision if there has been no petition for rehearing, or within 30 days of service of the order finally disposing of the petition for rehearing, or within 30 days after the final disposition by operation of law of any petition for rehearing.

The 30 day period commences the day after personal service or mailing of the decision or order, or the day after the final disposition by operation of the law of any petition for rehearing. (The date of mailing of this decision is shown below.) A petition for judicial review should be served upon, and name as the respondent, the following: the State of Wisconsin Real Estate Board.

The date of mailing of this decision is April 23, 1993.